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IN THE

Supreme Court of the United States

Spring Term 1978

No. 77-1103

EDWARD LEE BRYAN,
Petitioner,

vs.

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.,
Respondent

BRIEF OF RESPONDENT, MERRILL LYNCH, FENNER & SMITH, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This Brief in Opposition to Petition for Writ of Certiorari is submitted pursuant to Rule 24 and Rule 40 of the Rules of the Supreme Court of the United States (U.S.C. Title 28) to disclose to the Court that this cause should not be reviewed for the reasons hereinafter set forth in this Brief.

QUESTIONS PRESENTED

I. WAS THE RENDERING OF THE OPINION BY THE FOURTH CIRCUIT IN THIS CASE SO IRREGULAR AS TO CONSTITUTE A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN THE APPEAL OF THIS CASE?

II. WAS THE FOURTH CIRCUIT'S DECISION THAT THE TRIAL JUDGE SHOULD HAVE DIRECTED A VERDICT FOR THE RESPONDENT AT THE CLOSE OF THE EVIDENCE ERRONEOUS AND DID SUCH DECISION CONSTITUTE A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN THE APPEAL OF THIS CASE?

STATEMENT OF THE CASE

This action was instituted by the Petitioner, Edward Lee Bryan, on March 21, 1975, in the United States District Court for the Eastern District of North Carolina. Petitioner Bryan complained that the Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc., had failed to use due care in the management of Petitioner's margin account and in supervising Petitioner's account executive's handling of the margin account; had breached its contract with Petitioner; had violated the anti-fraud provisions of Section 10(b) of the Securities Exchange Act; and had violated other regulations and rules governing the management and handling of Petitioner's margin account.

The case was tried before a jury in the United States District Court for the Eastern District of North Carolina, the Honorable J. Braxton Craven, Jr., presiding, on August 9, 10, and 11, 1976. The Court denied Respondent Merrill Lynch's motions for a directed verdict at the close of Petitioner's evidence and at the close of all the evidence, and submitted the case to the jury on the issue of negligence only. A jury verdict in favor of Petitioner was returned in the amount of NINETEEN THOUSAND FIVE HUNDRED ($19,500.00) DOLLARS, and the Court denied Respondent's motions for judgment notwithstanding the verdict and for a new trial.

On August 17, 1976, the Respondent filed notice of appeal to the United States Court of Appeals for the Fourth Circuit. The case was set for oral arguments before the Fourth Circuit on April 8, 1977 before a panel consisting of Clark, Supreme Court Justice, Retired, Haynsworth and Russell. Because of a death of a member of Judge Haynsworth's family he was unable to be present at oral arguments. However it was agreed by counsel that Judge Haynsworth should participate in the decision of this case on the briefs, record and the tape of oral arguments.

Justice Clark died before the opinion was prepared. On November 9, 1977, the opinion of the Fourth Circuit, written by Judge Russell, was rendered. The Fourth Circuit reversed the judgment of the District Court in favor of the Petitioner and directed that judgment be entered in favor of the Respondent, Merrill Lynch. On February 4, 1978, Respondent received Edward Lee Bryan's Petition For Writ of Certiorari to this Court.

A review of the Statement of Facts set forth in the Petition For Writ of Certiorari indicates a voluminous and verbose mixture of argument intertwined with factual allegations of Petitioner and a general indictment of the Fourth Circuit's excellent practice of cutting through the

nonessential facts to reach the heart of the matter in order to render a succinct and well reasoned result.

The Respondent will not waste this Court's time nor demean itself or this Court by engaging in a line by line response to the obviously argumentative Statement of Facts submitted by the Petitioner. The Respondent respectfully refers the Court to the statement of the facts contained in the Opinion of the Fourth Circuit attached as an Appendix to Petition For Writ of Certiorari and incorporates by reference the facts stated in that Opinion as Respondent's Statement of Facts in this Brief.

ARGUMENT

I. THE RENDERING OF THE OPINION BY THE FOURTH CIRCUIT IN THIS CASE WAS PROPER, REGULAR AND DID NOT CONSTITUTE AN IRREGULAR DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN THE APPEAL OF THIS CASE.

Petitioner's initial complaint arises from circumstances beyond the control of anyone, and as stated in the Petition, "may very well not be a legal error in the technical sense" (Petition p. 15). Petitioner claims that the physical absence of Judge Haynsworth from oral arguments on April 8, 1977, and the death of Justice Clark before the publication of the opinion, constitutes such an irregularity and a departure from the accepted and usual course of judicial proceedings as to warrant a reversal of the decision of the Fourth Circuit in this matter.

The record indicates that Judge Russell and Justice Clark heard the oral arguments in the appeal on April 8, 1977. Judge Haynsworth, due to a death in his family, was not present. However, by agreement of counsel for both parties, Judge Haynsworth was to participate in the decision of this case on the briefs, the record and the tape

of oral arguments. The record is devoid of any requests by Petition to the Fourth Circuit for a rehearing of the case *en banc* or otherwise. It should also be noted that there were no dissents from the opinion written by Judge Russell.

Petitioner now seeks a Writ of Certiorari claiming that the physical absence of Judge Haynsworth, to whose absence Petitioner's counsel agreed, and the death of Justice Clark constitute some evidence of irregularity surrounding the decision of the Fourth Circuit. This claim is without merit. Contrary to the claims of Petitioner in this regard, the opinion of Judge Russell indicates that justice was in fact done in this case and that all standards of fairness and judicial propriety were met in the Fourth Circuit. No further comment on this claim is deemed necessary.

II. THE FOURTH CIRCUIT'S DECISION THAT THE TRIAL JUDGE SHOULD HAVE DIRECTED A VERDICT FOR THE RESPONDENT AT THE CLOSE OF THE EVIDENCE WAS CORRECT AND DID NOT CONSTITUTE A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The sole remaining question is whether or not there was sufficient evidence presented to permit this case to go to the jury in the first place. Petitioner is now complaining because the Fourth Circuit, in reviewing the evidence presented at trial, reached the sound conclusion that there was insufficient evidence presented to warrant submission of the case to the jury and that Respondent's motion for a directed verdict should be allowed.

Petitioner's theory of the case, as discussed in the Fourth Circuit's opinion, required proof that because of Merrill Lynch's purported negligence in failing to furnish Petitioner with an accurate statement concerning his margin

account, Petitioner lacked enough information to intelligently decide what to do with respect to his AMIC and Tally stocks and that if Petitioner had been furnished that information he would have sold out AMIC and Tally before he incurred the losses which he seeks to recover from Merrill Lynch.

It is against this theory that the evidence presented must be measured to determine the correctness or incorrectness of the Fourth Circuit's determination. It is well established that for purposes of determining a motion for a directed verdict, the evidence of the party opposing the motion should be considered in the light most favorable to that party and that the Court should allow the non-moving party the benefit of every reasonable inference arising from the evidence. However, with respect to allowable inferences, the foregoing rule requires that such inferences as may arise from the evidence be of reasonable probability and not based upon speculation or conjecture. *Wratchford v. S. J. Groves and Sons Company*, 405 F. 2d 1061 (4th Cir. 1969); *Minton v. Southern Ry. Co.*, 368 F. 2d 719 (6th Cir. 1966).

In this case, the Petitioner failed to present any evidence at trial to prove that his stock market losses in AMIC and Tally stocks were caused by the actions of Merrill Lynch. Proof of a causal connection between a defendant's allegedly negligent acts and the financial losses suffered by a plaintiff is an essential element of a negligence claim. *Reason v. Sewing Machine Co.*, 259 N.C. 264, 130 S.E. 2d 397 (1965); *Weatherman v. White*, 10 N.C. App. 480, 179 S.E. 2d 134 (1971). The Petitioner was required to prove that his injuries were caused by the negligence of Merrill Lynch and such proof of causation must exceed mere speculation or conjecture or the Respondent would be entitled to the directed verdict. *Johnson v. Williams*, 19 N.C. App. 185, 198 S.E. 2d 192 (1973); *Lane v. Dorney*, 250 N.C. 215, 108 S.E. 2d 55 (1959).

Instead of presenting evidence proving that Petitioner's stock market losses were caused by Respondent, the Petitioner's evidence, including his own testimony, shows that his stock losses in AMIC and Tally were solely the result of Petitioner's insistence in holding AMIC and Tally in the face of a declining market. The Respondent cannot be held liable unless the Petitioner had proved that the conduct of Merrill Lynch prevented the Petitioner from selling. The following clearly indicates that Respondent was not the cause of Petitioner's market losses.

It is abundantly clear that Petitioner could have avoided the loss in AMIC and Tally stocks only by selling before their market value declined. Petitioner claims that he did not sell because Merrill Lynch's allegedly negligent failure to provide him with information concerning his margin account caused him to remain uninformed to the extent that he could not make an intelligent decision to sell or hold, but that had he had the information, he would have sold and thereby avoided a loss.

At the trial, Petitioner admitted that he could have sold the AMIC and Tally stocks in his margin account at any time and that Respondent did not prevent him from selling the stocks. In response to questioning on cross examination about Petitioner's AMIC stock in his margin account during the period from October 12, 1973 to October 26, 1973, when the stock increased in value, Petitioner responded:

"A. I didn't sell.

Q. There was no reason why you couldn't have sold if you wanted to, was there?

A. I could have sold it."

Petitioner also stated during his cross examination:

"Mr. Manning, I never refute your argument that at any time since I ever did business with Merrill Lynch, I was never constrained from selling . . ."

Petitioner also stated during his cross examination:

"Q. Your losses occurred because of the drop in the market, didn't they?

A. My losses occurred, sir, by my selling the stock at less than I paid for it.

Q. All right, now, there was at no time in all of your dealings with Merrill Lynch any effort on Merrill Lynch to keep you from selling your stock at any time you wanted to sell it.

A. No. . . ."

The foregoing supports that portion of the Fourth Circuit's opinion on page 14 which states:

"There is not a scintilla of evidence on which the jury in this case could base a finding that the plaintiff, had he had a written statement from the defendant of the exact number of shares of AMIC and Tally stock in his margin account, would have sold either or both of such stocks on October 19, or on any particular date thereafter. The plaintiff, in perfect candor, admitted that he did not know whether he would have sold if he had been in possession of such written information."

Additionally, Petitioner's own testimony at trial indicates that he believed that the market value of AMIC and Tally stocks would increase and that he was contemplating buying additional shares in both stocks. Such conduct is at cross purposes with the theory of Petitioner's case.

Although the market value of AMIC rose to TWENTY-TWO ($22.00) DOLLARS per share on October 26, 1973, and did not drop below the October 12, 1973 level of EIGHTEEN ($18.00) DOLLARS and seven-eighth (⅞) per share until November 5, 1973, Petitioner chose not to liquidate his account at the higher price. He testified to his belief in the investment potential of the stocks in the following words:

"Well, the stocks were going down in November, and I still believe this idea that, you know, eventually the stocks would go up. . . ."

Pursuant to such belief, on November 15, 1973, Petitioner purchased One hundred (100) additional shares of AMIC and three hundred (300) additional shares of Tally in a joint cash account with his wife. Petitioner described the reason for his purchase by again indicating his view that the price of the stocks would increase, stating:

"And the idea here is that, anticipating that the stocks would go back up, and clearly putting it in my joint account with my wife, so that we wouldn't be vulnerable to this confusion in the margin account."

The first indication of any disenchantment with the stocks occurred on November 21. Bryan described his feelings at this time in the following words:

"It was apparent that on the 21st of November, really before the funds were due, even for the things I had bought the previous week, that the stocks were going down, and I told Mr. Lefort, go ahead and sell that — you know — and transfer the residual funds into the margin account."

On November 21, 1973, Bryan sold the 100 shares of AMIC in his cash account at 11⅝, 900 shares and 100

shares in the margin account at 11¾ and 11⅞ respectively. Despite the continuing decline in the price of AMIC, the plaintiff failed to sell additional shares, and his remaining 1,000 shares were liquidated on December 3, 1973.

The plain fact of the matter is that the Petitioner did not want to sell his AMIC or Tally stock at all, that Petitioner believed that the market would go up, and that nothing Merrill Lynch did or did not do had any effect upon Petitioner's actions with regard to the stock in his margin account. Petitioner knew he could sell his entire account and that Merrill Lynch imposed no restraints upon his doing so.

From the evidence presented, there was no basis, other than guesswork and conjecture on the part of the jury, upon which to conclude that Petitioner's failure to sell his AMIC and Tally stocks resulted in any manner from Merrill Lynch's alleged negligent failure to provide the Petitioner with information concerning his margin account. There being no evidence that any act on the part of Merrill Lynch caused the loss to the Petitioner, the motion for directed verdict was correctly decided by the Fourth Circuit and the Petition For Writ of Certiorari should not be granted.

CONCLUSION

The Petition for certiorari is without merit and should be denied.

Respectfully submitted this the 2nd day of March, 1978.

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CERTIFICATE OF SERVICE

I hereby certify that I am admitted to practice law before the Supreme Court of the United States; and that I have served a copy of the foregoing brief in opposition to Petition for Writ of Certiorari to the Supreme Court of the United States by depositing the same in a post office or an official depository to the attorney for the Respondent addressed as follows:

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This the 3 day of MARCH, 1978.

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